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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-758

PROVIDENT SECURITIES COMPANY, a California corporation,
Cross-Petitioner,

vs.

FOREMOST-McKESSON, INC., a Maryland corporation,
Cross-Respondent.

Cross-Petitioner's Reply Brief

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TABLE OF CONTENTS

	Page
I. The transaction was unorthodox	2
II. The transaction involved no potential for actual speculative abuse	3
III. The date of the sale was the date upon which possession and ownership were transferred	4
IV. The transaction should be deemed exempt because Provident acted as a liquidating agent	5
Conclusion	6

TABLE OF AUTHORITIES CITED

Cases

Pages

Blau v. Lamb, 363 F.2d 507 4

Kern County Land Co. v. Occidental Corp., 411 U.S. 582 ..... 2, 3, 4

Reliance Electric Co. v. Emerson Electric Co., 404 U.S. 418 2

Federal Statutes

48 Stat. 896, 15 U.S.C. § 78p(b) 3

Securities Exchange Act of 1934:
Section 16(b), 15 U.S.C. § 78p(b) ..... passim

State Statutes

California Corporations Code §§ 4605, 5000 5

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The Answering Brief (hereinafter "Answer") of cross-respondent Foremost-McKesson, Inc. (hereinafter "Foremost") is based upon a misunderstanding of the governing principles of law as well as a misunderstanding of the points presented in the cross-petition of Provident Securities Company (hereinafter "Provident"). As is discussed in our brief in opposition to Foremost's petition for a writ of certiorari, we believe that the opinion below is correct with respect to the ground upon which it affirmed the judgment and that it states a rule that will be easy to apply to all § 16(b) transactions. Even though we believe that the petition should be denied so as to enable the other

Circuits to consider the careful analysis made for the first time judicially by the Ninth Circuit, simple justice requires that—if the petition should be granted—all arguments should be considered by this Court.

We reply to Foremost's arguments in the order of the points raised in our cross-petition.

1. THE TRANSACTION WAS UNORTHODOX.

In contending that the transaction was orthodox (Answer, pp. 5-6), Foremost ignores this Court's ruling that orthodox transactions are "traditional *cash-for-stock* transactions" (*Kern County Land Co. v. Occidental Corp.* (1973) 411 U.S. 582, 593, emphasis added). Foremost also ignores the fact that Provident did not, as in a traditional cash-for-stock transaction, enter the market with cash seeking to purchase securities and did not pay cash for the securities. Rather, Foremost purchased Provident's assets in exchange for cash and debentures. And, the debentures were a part of the transaction only because Foremost did not wish to make its payment entirely in cash.

Although Foremost may not understand why transactions which are not traditional cash transactions may be exempt from § 16(b) (see Answer, pp. 5-6), this Court has made its position clear. Certainly, as Foremost observes, § 16(b) applies to "substantially all transactions occurring within the statutory time period" (Answer, p. 6, quoting from *Reliance Electric Co. v. Emerson Electric Co.* (1972) 404 U.S. 418, 422). However, Foremost has ignored the preliminary consideration, namely,

> "In interpreting the terms 'purchase' and 'sale,' courts have properly asked whether the particular type of transaction involved is one that gives rise to speculative abuse" (*Reliance Electric Co. v. Emerson Electric Co.* (1972) 404 U.S. 418, 424, ftn. 4).

Here, the record establishes only that a complete analysis of *Provident's* financial structure, assets and prospects was prepared (R., pp. 251-252). That analysis was made available to Foremost (ibid.). There was no reason for Provident to have, and there is nothing in the record which would show that it had, information about Foremost.

II. THE TRANSACTION INVOLVED NO POTENTIAL FOR ACTUAL SPECULATIVE ABUSE.

In contending that there did exist a potential for speculative abuse (Answer, p. 6), Foremost again misunderstands the rule set forth in this Court's opinion in *Kern County Land Co. v. Occidental Corp.* (1973) 411 U.S. 582. It is perhaps always possible to conceive of some possibility of access to inside information in any transaction. Foremost's arguments seem based upon the assumption that § 16(b) is directed against the possibility that one about to acquire some stock in a corporation may have information about that corporation.

Under *Kern*, however, it must be possible to assume or infer from the facts that a beneficial owner of shares had or was likely to have access to inside information *by reason of its ownership* so as to afford it an opportunity to reap speculative, short-swing profits (411 U.S. 596, 599).[1] As to this, the district court noted on the undisputed facts that:

> "[Foremost] makes no claim that any of the evils against which 16(b) were directed were present in this [transaction], or that Provident derived inside

1. Foremost's confusion is perhaps attributable to its refusal to recognize that § 16(b) is directed against unfair use of information obtained by an insider "by reason of his relationship to the issuer" and requires that, in the case of a beneficial owner only (as opposed to directors and officers), the relationship exist "both at the time of the purchase and sale" (15 U.S.C. § 78p(b); 48 Stat. 896).

> information, profit or advantage from its all-but-momentary status as an 'insider' of Foremost" (Appendix to Petition, p. ix).

In this regard, Foremost persists in its erroneous contention that all "voluntary" transactions are necessarily subject to § 16(b) without any examination of the underlying potential for speculative abuse (Answer, p. 2). That contention is, as was pointed out in Provident's cross-petition (at p. 13), contrary to this Court's decision in *Kern County Land Co. v. Occidental Corp.* (1973) 411 U.S. 582, 601-602, and was also rejected by the Second Circuit in *Blau v. Lamb* (2 Cir. 1966) 363 F.2d 507, 520.

Foremost also apparently does not understand that the facts to which it refers (at Answer, p.2) are, among others, relevant to the question of speculative abuse. Foremost does not and cannot refute those facts; namely, that Provident's sole motivation was to liquidate, that Provident did not want to receive any Foremost securities, and that Provident did so only as a result of a compromise. Indeed, as the district court pointed out,

> "In all its essential details the form of the transaction was insisted upon if not dictated by Foremost, often contrary to the plans and wishes of Provident. If the matter had been handled as Provident wished, this case could never have arisen" (Appendix to Cross-Petition, p. xi).

III. THE DATE OF THE SALE WAS THE DATE UPON WHICH POSSESSION AND OWNERSHIP WERE TRANSFERRED.

Foremost ignores, presumably because it cannot answer, the fact that the Ninth Circuit's decision with respect to the date of sale was based upon a misunderstanding of the terms of the underwriting agreement (see Provident's Cross-Petition, pp. 14-15). Instead, Foremost refers (An-

swer, pp. 3-4) only to the statutory definition of "sale" which provides no guidance as to the date of sale.

Here, the sale was pursuant to an underwriting agreement which defined October 28 as "the time of purchase" by the underwriters and provided that possession and the incidents of ownership would be transferred on that date. As pointed out in Provident's cross-petition (at pp. 14-15), Provident could have gained no speculative advantage from the underwriting agreement and therefore the date specified therein should be deemed to be the date of sale.

IV. THE TRANSACTION SHOULD BE DEEMED EXEMPT BECAUSE PROVIDENT ACTED AS A LIQUIDATING AGENT.

Foremost's arguments relating to Provident's status as a liquidating agent under California law seem to be based upon the possibility of the occurrence of events which did not in fact occur (see Answer, pp. 4-5). Neither the shareholders nor any state court revoked the election to liquidate. Rather, in accord with the plan of liquidation under state law, Provident planned to and did liquidate within a period of 12 months.

Provident's status was substantially different from a corporation acting in "the ordinary course of its business" (Answer, p. 5). It was charged by law with the obligation to "cease to carry on business except to the extent necessary for the beneficial winding up thereof" and to distribute the "corporate assets among the shareholders and owners of shares according to their respective rights and preferences" (Cal.Corp.Code §§ 4605, 5000; quoted at Appendix to Petition, pp. xliii-xliv).

CONCLUSION

For the foregoing reason, we respectfully submit that if Foremost's petition for a writ of certiorari should be granted, this conditional cross-petition should also be granted.

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